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SUBJECT: GUATEMALA GSP PETITIONS

1. (U) Summary and introduction: In this cable, post provides its comments on the petition submitted December 13, 2004, to USTR by the Washington Office on Latin America (WOLA) and the U.S./Labor Education in the Americas project (US/LEAP) to remove Guatemala from the list of GSP and CBI beneficiaries. The paragraphs below are keyed to the points in the WOLA/USLEAP petition, some of which were reiterated in a subsequent petition filed by the International Labor Rights Fund. While the Constitutional Court's decision against administrative fines by the Labor Inspectorate was unfortunate, the Government of Guatemala (GOG) is acting decisively to remedy the situation. That the GOG needs to address discrepancies in the labor code is clear; that they are doing so is equally clear. To punish a nation because its executive obeyed a high court's decision and then followed an established legislative procedure to remedy a situation is not the signal we wish to send. Therefore, we strongly support Guatemala's continued inclusion in the list of GSP beneficiary countries. End Summary.

The GSP Petition Point by Point  
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2. (U) The petition suggests that, "As firmly established by the International Labor Organization, Guatemalan labor law simply fails to meet international labor standards." In point of fact, the ILO conducted a study in 2003 that concluded that Guatemala has a framework of labor laws that give effect to the core labor principles embodied in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The petition cites Observations and Direct Requests by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) but fails to recognize that the ILO itself credited Guatemala for its Labor Code reform that "took account of the observations made over a number of years by the (CEACR)." Guatemala continues to engage actively with the ILO and its CEACR to address all pending Observations and Direct Requests.

2A. (U) The petition makes five points regarding the failings of Guatemala's labor law. The Berger Government, not yet one year old, has been developing a labor reform package to improve the labor code on these and other points. The package was pending before the Tri-partite Commission, however, when the Constitutional Court issued a decision that nullified many provisions of the 2001 reform (discussed below in point 2B). The GOG continues to work to address the pending points from the 2003 ILO study as well as to address the reestablishment of the gains achieved in the 2001 reform and lost in the Constitutional Court decision.

2A1. (U) The ILO noted that the wording of Guatemala's law could affect the right of public sector workers to strike. ILO conventions agree on the prohibition of strikes in essential services related to life, health, and safety of persons. Guatemala's law reform, however, did not expressly repeal the existing prohibition on strikes in the public transport and energy sectors. In reply to the CEACR's Observation (significantly an Observation, rather than a Direct Request), the GOG noted that they had implicitly repealed the prohibition by order while drafting a new reform package to formally resolve this interpretation of Guatemala's labor code. We note that, since this observation was made, the GOG has never declared a strike illegal in those sectors.

2A2. (U) The CEACR noted that in a strike vote, only cast votes should be counted in determining a majority. The GOG recognized the validity of this point and included it in the draft reform package mentioned in paragraph 2A.

2A3. (U) The petition says that Guatemala has a de facto ban on industrial unions, which allows employers, such as those in the apparel sector, to easily close their operations and move production to a non-unionized factory. In fact, Guatemalan law says only that a sector-wide union must have a membership of one-half plus one of the workers in an industry. Not one unionized factory in the textile and apparel sector has closed operations, either to move production to a non-unionized facility or for any other reason.

2A4. (U) Guatemalan labor law does indeed require that trade union executive committee members be of Guatemalan origin and employed by the enterprise in question, points questioned by the ILO. Ministry of Labor contacts told us that at the ILO meetings in Geneva in 2004, it was agreed by all parties that the issue be referred to the Tri-partite Commission, where it remains pending.

2A5. (U) The petition notes that agricultural workers have not been able to exercise the right to strike during the harvest. In point of fact, the Labor Code -- as the petition recognizes -- allows for agricultural workers to strike during harvest, but the major union representing commercial agricultural workers has not called for such a strike.

2B. (SBU) The petition correctly notes the effective measures included in the 2001 reform package, that the ILO also praised. The August 2004 Constitutional Court ruling did overturn key articles of the package, which was later interpreted to leave the Ministry of Labor with a temporary vacuum of authority to assess fines on employers found not to be in compliance with Guatemalan labor law. Following the court's decision, the Ministry continued to assess fines on non-compliant businesses. Appellate court decisions, however, began to overturn the fines based on the larger Constitutional Court ruling. For this reason, inspectors now take their findings to labor courts for court-ordered sanctions; a process that Ministry of Labor officials agree is cumbersome and inefficient, but only temporary.

Faced with these Appellate Court interpretations, the Ministry of Labor was forced to accept the temporary block to its powers in late November 2004. In January 2005, the Inter-Institutional Commission on Labor Rights, which includes the Ministries of Labor, Foreign Relations, and Economy, and other government agencies such as the Bank of Guatemala, began to address the issue in order to find a solution. Currently, the discussions are based on a long-term approach including a new legal initiative and a short-term approach in which the executive re-empowers the Ministry of Labor by decree. We have encouraged those involved to do both: empower the Ministry immediately by decree and then address the broader legal issues through consultation and legislation. Representatives of the textile and apparel employers' organization, VESTEX, told us that they favor an immediate executive order to re-empower the Ministry of Labor, followed by new legislation through the standard process.

The umbrella business confederation CACIF, which brought the challenge to the Constitutional Court, has repeatedly argued that it supports the concept of administrative sanctions so that businesses can move on without expensive litigation when they have clearly infringed the law. The 2001 legislation, however, employs formulae for calculating fines based on the size of a company that CACIF representatives say can lead to excessive fines for minor infractions. They claim they are willing to negotiate a new legislative initiative.

2C. (SBU) The petition correctly notes that Guatemala had prepared an extensive further reform of the labor code, to address outstanding issues in regard to child labor, sexual harassment, domestic labor, and reinstatement; a point for which the GOG should be commended rather than rebuked. The reform package was submitted to the Tripartite Commission for review, in accord with an ILO direct request. The new reforms were still under review when the Constitutional Court issued its decision to overturn key articles of the 2001 reform. As the petition itself notes, since reforms nullify pre-existing statutes, there is no automatic return to the status quo. For that reason, the new reforms cannot move forward until the situation with the 2001 reforms is resolved. We also would like to add that there is a difference of opinion in the legal community here whether the reform nullified pre-existing statutes. Chamber of Commerce representatives believe that the Constitutional Court's decision did, in fact, return Guatemala to status quo ante and that the Ministry of Labor can use those statutes as a basis for their activities.

13. (SBU) The Ministry of Labor is currently involved in a review of its practices and procedures. In doing so, the Ministry of Labor replaced more than thirty percent of its labor inspectors. The review of existing staff and procedures, the retirement or firing for cause of many of its inspectors, and the hiring and training of new inspectors has strained the capabilities of the Ministry. Furthermore, as noted above, the Constitutional Court decision of August 2004 put many of the Ministry's activities in question. For these reasons, the Ministry of Labor has had difficulty reaching its ambitious objectives. The activities, however, have been beneficial to the Ministry as an institution, and the continued constructive engagement with labor rights activities, such as the U.S. Department of Labor-funded Cumple y Gana program, the Commission for Verification of

Corporate Codes of Conduct (COVERCO), the tri-partite Alternative Resolution of Labor Disputes' Commission (RAC), and others have improved the morale and efficiency of the Ministry.

14. (SBU) The petition cites a 2002 U.N. report that covers the years prior to 2002 as evidence that trade unionists continue to be the target of violence, including murder. While this was true when written, there were no murder cases related to trade union activity in 2003 or 2004. The petition states that the murder of Julio Rolando Raquec is evidence that the "brutal legacy of violence against trade unionists continues to this day." While Raquec was the head of an organization under the larger umbrella of the General Center of Guatemalan Workers (CGTG), his murder was judged to be a clear case of common crime by the police, prosecutors, his own family, the head of the CGTG, and indeed, by Raquec himself, who was able to make a report to officials before he died of his injuries. He was shot four times by unknown men who robbed him. Raquec's wife stated that she believed the aggressors were gang members who operated in the area.

While we regret Raquec's death and do not dismiss the legacy of violence against trade unionists, the fact is that violence against trade unionists -- for their union activities -- has diminished in recent years. Police are much more active in both protection from and investigation of threats. Additionally, the Attorney General's office has a Special Prosecutor for Crimes against Trade Unionists and Journalists.

Regarding the case of Imelda Lopez de Sandoval, the Special Prosecutor does not have any information to link the events described in the petition to her union activities. Also, the Special Prosecutor has no authority to investigate the Nobland (NB) case cited in the petition as the conflict is between rival groups of employees.

15. (SBU) As noted in the petition, the GOG's enforcement of labor laws remains weak. This does not take into account, however, efforts to improve the professionalism of the Ministry of Labor staff. The Constitutional Court decision greatly restricted the efficacy of the Ministry's activities, but those activities continue. The petition cites no evidence of government wrongdoing.

The Ministry of Labor has an inspector dedicated to each of the cases cited in this section of the petition. Virtually all of these situations are cases still pending before various courts. In none of the cases have the employees called for a strike.

16. (SBU) International textile quotas on China and India expired December 31, 2004. For this reason, the entire textile and apparel industries in Guatemala and other countries have been experiencing difficulties. We have met with GOG officials, industry representatives, and staff of the Korean Embassy (Note: many of Guatemala's textile factories are Korean-owned. End note.) to raise concern about the responsibilities of factory owners who may choose to leave Guatemala. The GOG is continuing to engage factory owners and investors regarding their legal responsibilities.

The petition correctly notes that, in the case of NB, the legal system did, in fact, protect the establishment of the union and achieve the reinstatement of fired workers. The owner of the factory hired an independent consultant to review labor practices and when that consultant reported non-compliance, the company immediately began negotiations of a collective-bargaining pact. We add that, although the pact has not yet been concluded, the parties have agreed to almost 200 articles. Only 12 articles remain outstanding. The petition notes that all pending articles are in regard to pay and other forms of remuneration. We note that one of the articles has to do with a salary increase, but that many of the others are demands for such items as school supplies for employees' children, paid holidays for Father's Day and the anniversary of the founding of the union, and a party paid for by the company to celebrate the founding of the union. In short, several of the pending concerns have little to do with the employees' labor rights. The petition notes that management called off negotiations, but we would add that the union did not request a meeting during the last three months of 2004. NB management and the union have scheduled negotiation sessions in January 2005.

17. (SBU) We agree that child labor in Guatemala persists and warrants international attention and support, which Guatemala has received from the U.S. Department of Labor, USAID, and ILO/IPEC, amongst others. The extent of the informal economy in Guatemala, as in all developing countries, inhibits the collection of reliable data as the petition demonstrates by citing two sources regarding the number of child domestic laborers. One source determined that there are 17,350 children in that status and the other source claimed 92,800. While we agree that even one child laborer is too many, the

GOG and the donor community are engaged in many activities in the health, education, and social welfare sectors to minimize this unfortunate practice. Enforcing labor laws in the informal sector is an immensely difficult proposition in any country, and the Guatemalan Ministry of Labor, as the petition agrees, has developed a reform package to the Labor Code to address these issues. The Tri-Partite Commission is currently reviewing the reform proposal; again, as the ILO requested the GOG to do.

Final Comments  
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18. (U) The petition does not indicate GOG wrongdoing in any of the cases cited in Sections 5 or 6 -- stories of factories shutting down, owners exhausting the legal appeals available to them, or "management engaged in anti-union activities including repeated threats to close the factory, blaming the union for lost business, sending workers to mandatory anti-union meetings, and trying to pit the workers against the union." Post notes that in none of these cases did the aggrieved workers go on strike to protest.

19. (U) The Constitutional Court's decision was unfortunate, untimely, and, in our opinion, on rather dubious legal justification. Nonetheless, we do not believe that we should punish Guatemala because its executive paid attention to the legal decision of its independent judiciary. The GOG is working to resolve the legal problems through a process that the ILO requested it follow. The petition usefully raises attention to this matter, and we will continue to engage the GOG to resolve this and other matters. Most of the points cited in the petition, and in particular those of child labor, are reflections of Guatemala's dire poverty. We believe that the most effective way to address this underlying cause is to encourage continued economic growth. GSP benefits are the primary tool currently available to allow this to happen. Thus, we strongly support Guatemala's continued inclusion in the list of GSP beneficiary countries.  
HAMILTON